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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MARY GLASSBERG, Plaintiff and Appellant, v. BANKERS WARRANTY GROUP, INC. Defendant and Respondent.	G047025 (Super. Ct. No. 30-2011-00479405) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kim Garlin Dunning, Judge. Affirmed.

Lakeshore Law Center and Jeffrey Wilens for Plaintiff and Appellant.

Gaglione, Dolan and Kaplan, Jeffrey S. Kaplan and Craig D. Aronson for Defendant and Respondent.

* * *

Plaintiff Mary Glassberg filed an action against defendant Bankers Warranty Group, Inc. on behalf of herself and other members of a putative class for unfair competition (Bus. & Prof. Code, § 17200 et seq.), breach of contract, and breach of the implied covenant of good faith and fair dealing arising from her claim under a service contract she bought when purchasing a television. Plaintiff appeals from the judgment entered after defendant's demurrer to the complaint was sustained without leave to amend. She argues that for purposes of ruling on the demurrer, (1) as to the breach of contract claim we must accept her interpretation of the meaning of the term depreciated value as used in the contract; (2) defendant's interpretation of that same term violates the implied covenant of good faith and fair dealing; and (3) depreciated value as used in the contract was deceptive and constituted unfair competition.

We conclude plaintiff did not sufficiently plead any of these causes of action and there is no reasonable probability she could amend to state a viable claim. Thus we affirm.

FACTS AND PROCEDURAL HISTORY

According to the third amended complaint (complaint), plaintiff bought a 52-inch LCD television from Linder's Furniture store for just under $3,200. At the same time she bought a service agreement (agreement) for $399.99. A copy of the agreement is attached to the complaint. Although plaintiff alleges she purchased the agreement from Linder's as the "sales agent for" defendant, the agreement itself states the issuing dealer is the obligor.

The pre-printed form states, "Subject to the terms and conditions of the [agreement], service performed . . . shall consist of labor and parts necessary to restore Your product to normal operating condition." "The [agreement] provides coverage for the repair or replacement (as applicable) of the covered Product . . . ." It also explains,

"The total payment(s) for all claims under this contract shall not exceed the depreciated value of the covered product or system in operating condition at the time of the claim excluding taxes."

Further, "At the Administrator's option, Your covered product may be replaced with a new or reconditioned product of like kind and similar features. The price of the replacement product shall not exceed the retail purchase price of the original covered product. The Administrator's responsibility is to replace Your Product with a product of similar features, capacity and/or efficiency. . . . If the Administrator elects to replace rather than repair Your covered Product and a replacement product as described above is not available, the Administrator will pay You a cash settlement. The cash settlement amount shall not exceed the depreciated value of the covered product in operating condition at the time of the claim, excluding taxes. . . . Replacement of a covered product or payment of a cash settlement will fulfill this agreement in its entirety and will cancel and discharge further obligations under the Service Contract, where allowed by law."

The complaint pleads if the product covered by the agreement no longer works defendant may repair or replace it at its sole cost or "pay a cash settlement." It refers to the provision set forth above that, as plaintiff claims, "purported[ly]" limits payments to the depreciated value of the item.

The complaint alleges that when the television malfunctioned 26 months after she bought it, plaintiff made a claim under the agreement. Defendant determined a panel needed to be replaced. It calculated the depreciated value at $1,343.69 and, after deducting $75 paid to the service representative who diagnosed the problem, there was a $1,268.69 balance. The cost of a new panel was just over $2,100 and defendant could not find a comparable model to replace plaintiff's television. Therefore, defendant sent plaintiff a check for $1,268.69 as full payment under the agreement.

Plaintiff alleges the term "depreciated value" is not defined in the agreement and is therefore ambiguous. She claims that generally it means a lower value than the original price but alleges "there is no universally understood measure of 'how much' lower." The fire insurance industry has its own depreciation tables to pay homeowners for property destroyed in a fire. Those tables give a color television a 12-year lifespan with a straight-line depreciation of 8.3 percent a year. Defendant uses a different depreciation rate that gives products "a much shorter 'life span' . . . and accelerates the depreciation in the early years . . . ." Under this formula plaintiff's television lost approximately 60 percent of its value at the time it malfunctioned as opposed to 18 percent it would have lost under the fire insurance industry table, resulting in a lower payment.

The complaint alleges a reasonable consumer would not have anticipated defendant would use such a method of calculating depreciation. Plaintiff pleaded she read depreciated value to mean the television "would still have more than 75[percent] of its value after two years, most of its value after five years and still have significant value 10 years later or longer." Had she known defendant's interpretation, she would not have purchased the agreement but she and members of the putative class would have purchased a "comparable" service contract from one of two other issuers for "approximately the same price" as defendant charged. These other policies allegedly limit their payouts to "the original purchase price, not some undefined 'depreciated value.'" (Underscoring omitted.)

Plaintiff pleads she was "likely to be deceived by the limitation" on the total amount that would be paid and "there was no business justification for [defendant] promising to pay up to the 'depreciated value' of a covered product while concealing that [it] used a bizarre and unusual method of depreciation." Plaintiff was induced to select the agreement at issue rather than a different service contract. This allegedly was a violation of Business and Professions Code section 17200.

In the breach of contract cause of action plaintiff relies on the alleged ambiguity of the term "depreciated value," claiming her interpretation is that it would mean the same as that used in a fire insurance policy. Defendant's interpretation breached the agreement because plaintiff was paid less than what she would have been paid using the insurance industry tables. Plaintiff alleges her damages are $1,279.49. She also seems to rely on this alleged breach of the express terms of the agreement as the basis for the breach of the implied covenant of good faith and fair dealing cause of action.

After plaintiff received the payment from defendant she filed this action. When the court sustained demurrers to the original, first amended, and second amended complaints, Associated Volume Buyers, Inc. (AVB), the other named defendant (not a party to this appeal), filed a demurrer to the complaint, in which defendant joined. Defendant also filed a separate pleading in support of AVB's demurrer. After lengthy argument, including a discussion of the ability of plaintiff to amend, the court sustained the demurrer without leave to amend.

DISCUSSION

1. Standard of Review

An order sustaining a demurrer without leave to amend is reviewed de novo. (*Del Cerro Mobile Estates v. City of Placentia* (2011) 197 Cal.App.4th 173, 178.) """We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] . . ." . . . ."" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

2. Breach of Contract and the Implied Covenant of Good Faith and Fair Dealing

The basis of these two causes of action is the allegation that the meaning of "depreciated value" in the agreement is ambiguous. Plaintiff posits her construction of

the term, which is the method used "in the insurance context." She contends this is a reasonable interpretation that we must adopt for purposes of analyzing the demurrer. Although not ever specifically alleged, this appears to be the basis of her claim defendant breached the contract by failing to pay her a larger amount.

"In the context of a demurrer, the court must conditionally consider the parol evidence alleged in the complaint, to determine if it would be relevant to prove a meaning to which the language of the instrument is reasonably susceptible. . . . [I]f the trial court conditionally accepts as true that the plaintiff can proffer specified parol evidence and, having considered the parol evidence allegations, then determines as a matter of law that the parol evidence alleged must be disregarded because, for whatever reason, the contract is not reasonably susceptible of the interpretation plaintiff alleged," then the demurrer is properly sustained. (*George v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 1112, 1122.)

Here plaintiff alleges there is no parol evidence or if any, it "is not determinative." Thus there is none for us to consider as possible support for her meaning of depreciated value. The allegation the term depreciated value means the insurance industry standard simply is not a reasonable interpretation. The agreement does not specify that defendant must use any particular standard; and nothing in the language prevents defendant from using its own method.

Plaintiff's contrary assumption is unreasonable. This is not a fire insurance policy and nothing in the language of the agreement suggests that it is. Plaintiff did not obtain that type of coverage or pay the premiums that are charged for such a policy. Further, even assuming plaintiff understood that meaning of depreciation, her "'undisclosed intent or understanding is irrelevant.'" (*Cedars-Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 980.) "'[I]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that

controls interpretation.' [Citation.]" (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc*. (2003) 109 Cal.App.4th 944, 956.)

The hearing in the trial court unfortunately took a left turn, and a good portion of the discussion focused on whether the agreement provided or should provide for a minimum payment. Plaintiff devotes a fair amount of her briefs arguing the same thing. But that question is irrelevant to the analysis. The complaint does not plead and the agreement does not set out a minimum payment. It provides for a maximum amount, which defendant paid to plaintiff.

And the complaint alleges that. It states defendant "used its depreciation methodology and calculated the depreciated value of the television at" $1,343.69. Defendant sent a check for the net value of $1,268.69, which the complaint pleads "was the full payment of the 'depreciated value.'" Thus, plaintiff alleged defendant paid the full amount due under the terms of the agreement.

Plaintiff asserts she could amend to plead the minimum amount due. But this is just another way of arguing she was entitled to be paid a value using the fire insurance industry standard, a meaning to which the agreement is not susceptible.

Any way you look at it, the only issue is whether the agreement is reasonably susceptible to the meaning plaintiff attaches to the term depreciated value. Since it is not, there is nothing plaintiff can allege to sufficiently amend the complaint. She cannot change the terms of the agreement, which is attached to the complaint. She has already had three opportunities to state a valid claim and has been unable to do so. The burden is on her to show there is a "'reasonable possibility'" she can amend (*Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at p. 1126) and she has not met that burden. Therefore, there is no basis to grant her leave to amend.

Although not clearly pleaded, the breach of the implied covenant of good faith and fair dealing apparently is based on the same allegation, i.e., that defendant "underpaid the 'depreciated value'" of the television, breaching the express term of the

agreement. Plaintiff never explicitly alleges this was also a breach of the implied covenant. But reading the complaint liberally, as we must do for our review (*Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 671), we conclude plaintiff intended to allege breach of the express term of the agreement was also a breach of the implied covenant. Because plaintiff did not sufficiently plead breach of any express covenant, the cause of action for breach of the implied covenant also fails. And for the same reasons as above, there is no basis to grant leave to amend.

3. Unfair Competition

Under Business and Professions Code section 17200, "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice." Plaintiff rests this cause of action on the same theory as the other two, namely, the meaning of depreciated value. She alleges that defendant engaged in unfair competition by concealing its method of determining depreciation. This caused consumers, including herself, to purchase this agreement instead of one that would give "better value."

This is not a sufficient pleading. In *Van Ness v. Blue Cross of California* (2001) 87 Cal.App.4th 364, the plaintiff purchased a preferred provider health insurance policy that had a two-tiered fee schedule depending on whether the doctor was one of the preferred providers or not. When the plaintiff was treated by a doctor who was not a preferred provider, benefits were less than those the plaintiff believed should have been paid. He sued the defendant for, among other things, breach of contract and the covenant of good faith and fair dealing and unfair and fraudulent business practices. He claimed the policy and promotional brochure did "not 'clearly and understandably communicate' to the average layperson 'the severe limitation on coverage represented by the limited fee schedule.'" (*Id*. at p. 373.) After reviewing the language of the policy and the brochure the court ruled they were not ambiguous and did not provide a basis for the plaintiff's interpretation. (*Id*. at p. 375.)

The unfair business practices cause of action rested on the same claim the policy and brochure were ambiguous and deceptive. The court's determination they were not, precluded the unfair business practice claim as well. "Our conclusion that the clear language of the policy and promotional [did not reasonably support the plaintiff's interpretation of the documents] disposes of this claim." (*Van Ness v. Blue Cross of California, supra,* 87 Cal.App.4th at p. 376.)

That is the case here as well. As discussed above, the language of the agreement is not reasonably susceptible to plaintiff's suggested interpretation of the meaning of depreciated value. The complaint has not adequately pleaded defendant concealed the meaning. Nor did it allege any other unfair business practice. Further, plaintiff has not shown there is a reasonable possibility she could amend.

4. Parties to Contract

Defendant argues it cannot be liable for breach of contract and breach of the implied covenant of good faith and fair dealing because it was not a party to the contract but was only the administrator. Because we dispose of the issues based on the substance of the causes of action, there is no need to and we do not resolve this claim.

5. Class Action

The trial court sustained the demurrer without leave to amend based on the inadequacy of the substantive claims. Presumably that is the reason it did not reach the class action arguments in the demurrer. We affirm the judgment based on the insufficiency of the substance of the three causes of action and do not and need not decide the class action issue either.

DISPOSITION

The judgment is affirmed. Defendant is entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.